No. 14-1406

In the Supreme Court of the United States

STATE OF NEBRASKA, ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General
WILLIAM B. LAZARUS
MARY GABRIELLE SPRAGUE
KATHERINE J. BARTON
DARON CARREIRO
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Congress diminished the boundaries of the Omaha Indian Reservation by the Act of Aug. 7, 1882, ch. 434, 22 Stat. 341.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 774 F.3d 1166. The opinion of the district court (Pet. App. 9-78) is reported at 996 F. Supp. 2d 815.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2015. A petition for rehearing was denied on February 26, 2015 (Pet. App. 80-81). The petition for a writ of certiorari was filed on May 27, 2015. The petition was granted on October 1, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 is reproduced in the appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. The Omaha Tribe settled in the Missouri River valley more than 500 years ago. Over the course of several centuries, the Tribe established villages in northeastern Nebraska, farmed the land, and hunted deer and bison across the plains. But the Tribe increasingly found itself threatened by westward expansion, warfare with other tribes, and disease. Following the United States' acquisition of its territory in the Louisiana Purchase, the Tribe turned to the United States for protection. J.A. 875-879.

a. In 1854, the Omaha Tribe entered into a treaty with the United States "reserv[ing]" land for the Omahas "for their future home." Treaty with the Omahas, Mar. 16, 1854 (1854 Treaty), 10 Stat. 1043 (J.A. 1019-1028). The Tribe agreed to "cede to the United States" and "forever relinquish all right and title to" a portion of its historic lands "[i]n consideration of" a fixed sum of $840,000. J.A. 1020, 1022. The remaining land, which was designated the Omaha Reservation, comprised 300,000 acres in northeast Nebraska. Pet. App. 20.

In 1865, the Omaha Tribe agreed to "cede, sell, and convey" to the United States approximately 98,000 acres from the northern part of the Reservation "[i]n consideration of" a fixed sum of $50,000 and certain other promises. Treaty with the Omaha Indians, Mar. 6, 1865 (1865 Treaty), 14 Stat. 667 (J.A. 1014-1019); see Pet. App. 21. The 1865 Treaty required the Tribe to "vacate and give possession of the lands ceded" by the treaty "immediately after its ratification," so that the land could be made available to the Winnebago Tribe. J.A. 1015; see J.A. 1018. The 1865 Treaty also authorized allotments from the remainder to be made

to individual members of the Omaha Tribe. J.A. 1016-1017. Relatively few Omahas chose allotments, however. Most continued to reside in "kinship communities" near the Missouri River on the eastern side of the Reservation and to hunt on the Tribe's traditional hunting grounds near its western border. J.A. 898.

In 1872, the Tribe requested help in raising additional funds to aid the transition of its members to farming. J.A. 898-899. In response, Congress authorized the Secretary of the Interior, "with the consent and concurrence of the Omaha tribe," to survey, appraise, and sell up to 50,000 acres on the western side of the Reservation, to be delineated by a north-south line. Act of June 10, 1872 (1872 Act), ch. 436, 17 Stat. 391 (J.A. 631-635). Unlike the 1854 and 1865 Treaties, the 1872 Act did not provide that the United States itself would purchase the land. Instead, it authorized the Secretary "to offer the [land] for sale," to solicit "sealed proposals," and to accept "the highest bids"—provided that the bid was no less than the appraised value of the land or $1.25 per acre. J.A. 631-632. The proceeds were to be deposited in the United States Treasury to be used for the benefit of the Tribe. J.A. 632. The 1872 Act failed, however, to raise substantial funds for the Omahas: Only two sales comprising 300.72 acres were made under the statute. Pet. App. 23, 41.

In 1874, the Omaha Tribe sold to the United States an additional 12,374.53 acres from the northeastern corner of the Reservation for use by the Winnebago Tribe. J.A. 196. The Omahas agreed, "in consideration of the sum of [$30,868.87]," to "grant, bargain, sell and convey to the United States * * * all the right, title and interest of the Omaha Indians, in and to" the

land. *Letters Received by the Office of Indian Affairs, 1824-81*, M234, Roll 606, 839-842 (1874 Conveyance); see Act of June 22, 1874, ch. 389, 18 Stat. 146-147, 170 (appropriating funds for the purchase).

In 1880, the Tribe entered an agreement with the Sioux City and Nebraska Railroad Company granting a right of way "across the Omaha Reservation." C.A. App. 2325. The right of way cut diagonally across the Reservation through the lands identified for sale in the 1872 Act, sloping southeastward along Logan Creek. *Id.* at 2325-2326; J.A. 907. The Tribe obtained a fixed price of $7.00 per acre. J.A. 907.

b. In 1882, Congress again authorized the Secretary to survey, appraise, and offer for sale lands on the western side of the Reservation. See Act of Aug. 7, 1882 (1882 Act), ch. 434, 22 Stat. 341 (J.A. 227-233). The 1882 Act provided that "the Secretary of the Interior [shall] be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company." J.A. 227. Like the 1872 Act, the area made available for purchase totaled approximately 50,000 acres. Pet. App. 25. But because the 1872 Act had used a north-south boundary line—whereas the 1882 Act relied on the diagonally sloping railroad right of way—the areas opened for sale by the two acts did not overlap perfectly: Some of the area that had been opened by the 1872 Act fell east of the right of way, and thus was not available for sale under the 1882 Act. See J.A. 1306 (map).[1]

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[1] The 50,000 acres opened for sale by the 1872 Act would have extended into Range 7 East, causing the north-south dividing line

The 1882 Act authorized the Interior Secretary to make the land available for sale, in lots of up to 160 acres, to "bona fide settler[s]." J.A. 227; see J.A. 228. Lot sales were permitted at the "appraised value" of the land or $2.50 per acre, whichever was greater, to be paid in three installments. J.A. 228-229. The net sale proceeds—"after paying all expenses" involved in administering the 1882 Act—were to "be placed to the credit of said Indians in the Treasury of the United States" and expended annually for their benefit. J.A. 229.

The 1882 Act also provided for the further allotment of land to members of the Tribe. J.A. 229-233. Allotments made under the 1882 Act were intended "to be in lieu of" (*i.e.*, to supersede) any allotments that had been made under the 1865 Treaty. J.A. 230. Tribal members were permitted to select their allotments "in any part of said reservation either east or west of [the railroad] right of way." J.A. 233. Consistent with then-prevailing Indian policy, the 1882 Act provided that the Secretary would hold each allotment in trust for 25 years. After that time, allottees would receive patents to their allotments in fee from the United States. J.A. 231. Once the process of issuing the patents was completed, all tribal members would "have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska." *Ibid.*

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between available land and unavailable land to bisect the railroad right of way. See J.A. 1306. Under the Public Land Survey System, land is identified by six-mile vertical columns called ranges and by six-mile horizontal rows called townships. See U.S. Geological Survey, *The Public Land Survey System*, http://nationalmap.gov/small_scale/a_plss.html.

c. To implement the 1882 Act, the Secretary of the Interior appointed Alice Fletcher as special agent and charged her with responsibility "to oversee the allotment process." J.A. 203. Allotment was to take place first, before any lands were opened for sale to settlers. Thus the Commissioner of Indian Affairs instructed Fletcher, "as one of her first duties," to "determine whether any tribal members wanted allotments west of the railroad right of way, so that appraisal of land to be sold could move forward." J.A. 344-345; see J.A. 949 ("[Y]ou will ascertain whether any of the Indians desire to make selections west of the railroad, and if there are any who do, they must be required to make them at *once*.") (citation omitted).

Fletcher encouraged tribal members to select allotments near the right of way, and several did. J.A. 203-204. Fifteen selected allotments that were partially or fully located west of the right of way, and several of those straddled the right of way. J.A. 944. "[T]he total acreage in Omaha allotments lying west of the Sioux City and Nebraska Railroad was approximately 935 acres." *Ibid.* (emphasis omitted). Most of the allotments were instead chosen further east, closer to the Missouri River, where the Tribe had long resided. J.A. 204.

"Upon completion of the initial allotment process, the land west of the railroad right-of-way was opened to settlers on April 30, 1884." J.A. 204. Settlers began to buy up the opened lands, a process that continued for three decades. J.A. 206. Many of the purchasers failed to make the required installment payments, however, and in 1885, Congress authorized extension of the payment deadlines required by the 1882 Act, provided that the Interior Secretary could

obtain "the consent of the Indians." Act of Mar. 3, 1885 (1885 Act), ch. 341, 23 Stat. 370; see J.A. 351-352. Congress authorized several additional extensions—in 1886, 1888, 1890, and 1894—each time referring to the area opened for sale as being "on the Omaha Indian Reservation" or as "Omaha lands." Act of Aug. 11, 1894 (1894 Act), ch. 255, 28 Stat. 276; Act of Aug. 19, 1890 (1890 Act), ch. 803, § 1, 26 Stat. 329; Act of May 15, 1888 (1888 Act), ch. 255, § 2, 25 Stat. 150; Act of Aug. 2, 1886 (1886 Act), ch. 844, 24 Stat. 214.

In 1912, Congress enacted a statute that opened for sale, under terms similar to those of the 1872 and 1882 Acts, nearly all remaining unallotted land on the Reservation—including lands east of the railroad right of way. Act of May 11, 1912 (1912 Act), ch. 121, § 1, 37 Stat. 111. Settlers also purchased much of the allotted land, which became eligible for sale once it was no longer held in trust by the United States.[2] See J.A. 961 ("By 1916, nearly ninety percent of all Omaha allottees holding fee-patents had either sold their lands or mortgaged them so heavily that they had little chance of ever reclaiming them."). As of 1920, Indians made up only about 15% of the population east of the right of way. J.A. 366.

2. Pender, Nebraska, is a town situated on land abutting the west side of the Sioux City and Nebraska

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[2] Shortly before expiration of the trust period for allotments under the 1882 Act, President Taft extended the trust period for an additional ten years. J.A. 959. But in response to local pressure, the Bureau of Indian Affairs, as authorized by the Burke Act passed in 1906, see J.A. 958, established "competency commissions" intended to identify Omahas who were "competent to manage their allotments," J.A. 959-960. Once deemed competent, a tribal member would be issued a fee patent and permitted to sell his land—which more than 90% did. J.A. 960-961.

Railroad right of way. Pet. App. 11. It was established in 1885, after the western portion of the Omaha Reservation was opened for sale. *Id.* at 38. Pender now has a population of approximately 1300 residents and is the only town within the disputed area; approximately 1200 other people also live in the disputed area. *Id.* at 14-15; J.A. 366. Pender is located in Thurston County, which is wholly encompassed within the area reserved for the Omaha and Winnebago Tribes in the 1865 Treaty. Pet. App. 15; J.A. 357-358.

a. An Indian tribe has been largely divested of jurisdiction over the conduct of non-Indians on fee land within the tribe's reservation as a result of the patenting of the land to non-Indians under surplus-lands and allotment acts. See *Montana* v. *United States*, 450 U.S. 544, 559 & n.9, 565-566 (1981). One exception is Congress's decision to "delegate[] authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." *Rice* v. *Rehner*, 463 U.S. 713, 715 (1983). The general prohibition on introducing alcohol into Indian country, see 18 U.S.C. 1154, 1156, does not apply to sales made "in conformity" with state law and with "an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." 18 U.S.C. 1161.

In 2004, the Omaha Tribe adopted an alcoholic beverage control ordinance regulating the sale of alcohol within the boundaries of the Reservation. The ordinance was certified by the Department of the Interior in 2006. 71 Fed. Reg. 10,056 (Feb. 28, 2006). Following certification, the Tribe began notifying

liquor retailers, including retailers in Pender, of its intention to enforce the ordinance. Pet. App. 17-18.

In 2007, Pender and several beverage retailers sued tribal officials in federal district court seeking a declaration that Pender is not within the Omaha Reservation because the 1882 Act had diminished its borders. The plaintiffs sought an injunction barring the Tribe from enforcing its liquor ordinance in Pender. Pet. App. 18. The court granted a temporary restraining order and stayed further proceedings so that the plaintiffs could exhaust their remedies in Omaha tribal court. *Id.* at 18-19. On February 4, 2013, the tribal court concluded that the 1882 Act did not diminish the Reservation's boundaries. J.A. 77-138. This action then resumed in the district court. The State of Nebraska intervened as a plaintiff, denying the Tribe's entitlement to a share of motor fuel tax revenue collected by the State in the disputed area. J.A. 285-299. The United States intervened as a defendant. Pet. App. 47.

b. On cross-motions for summary judgment, the district court ruled in favor of the Tribe. Pet. App. 9-78.[3] To determine whether the 1882 Act had diminished the Omaha Reservation, the court applied the three-prong test articulated in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), for determining whether a statute "clearly evince[s]" the requisite congressional intent to "divest a reservation of its land and diminish its boundaries." *Id.* at 470. Evaluating each factor, the

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[3] Petitioners conceded that 18 U.S.C. 1161 permits the Tribe to regulate liquor sales "on its reservation land and in 'Indian country,'" Pet. App. 11 n.2, and thus that the Tribe's ordinance applies to liquor retailers in Pender if the retailers are within the Reservation. Petitioners did not appeal that aspect of the court's ruling.

court concluded that the 1882 Act did not diminish the Reservation. Pet. App. 55-76.

First, the district court examined the statutory language, which *Solem* identified as the "most probative evidence of congressional intent." 465 U.S. at 470. The court agreed with petitioners' "admi[ssion]" that the language of the 1882 Act "does not work in their favor." Pet. App. 56. The court based that conclusion on several features of the 1882 Act, including its plain language and the contrast between that Act and "the Omaha Treaties of 1854 and 1865," in which the Tribe "expressly agreed to 'cede, sell, and convey' land to the United States and 'relinquish . . . all claims' thereto in exchange for fixed sums of money." *Id.* at 58 (citations omitted); see *ibid.* ("[B]oth Congress and the Tribe knew how to alter the reservation boundaries when they chose to do so.").

Second, the district court examined "[t]he legislative history and the circumstances surrounding the 1882 Act." Pet. App. 63. In the court's view, "[n]one of th[e] legislative history establishes that Congress clearly contemplated" diminishment of the Reservation boundaries. *Id.* at 65. The court further concluded that the evidence was "insufficient to establish an 'unequivocal,' widely held, contemporaneous understanding that the 1882 Act would diminish or alter the boundaries of the Omaha Reservation." *Ibid.* (quoting *Solem*, 465 U.S. at 471).

Third, the district court analyzed the subsequent treatment of the disputed area and the pattern of settlement—which this Court has considered "'less illuminating' than contemporaneous evidence." Pet. App. 69 (quoting *Hagen* v. *Utah*, 510 U.S. 399, 420 (1994)). The district court concluded that "the Omaha

Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." *Id.* at 72. The court also found "'mixed' evidence regarding the demographics of the area west of the right-of-way." *Id.* at 76 (citation omitted).

Summarizing its findings, the district court stated:

> [N]either the 1882 Act's statutory language, the legislative history and circumstances surrounding the passage of the Act, nor the demographic history of the land west of the right-of-way demonstrate clear congressional intent to diminish the boundaries of the Omaha Indian Reservation or a widely-held, contemporaneous understanding that Congress's action would diminish those boundaries.

Pet. App. 77.

c. The court of appeals affirmed. Pet. App. 1-8. Based on its "de novo review," *id.* at 6, the court concluded that the district court had

> accurately discerned the contemporaneous intent and understanding of the 1882 Act. The [district] court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus.

Id. at 7. The court of appeals thus found "nothing in this case to overcome the 'presumption in favor of the continued existence' of the Omaha Indian Reservation." *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

I. When deciding whether an Indian tribe's reservation has been diminished, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984). The district court and court of appeals correctly determined that Congress did not intend for the 1882 Act to diminish the Omaha Reservation.

A. "The most probative evidence of congressional intent," *Solem*, 465 U.S. at 470, is the language of the 1882 Act itself. The 1854 and 1865 Treaties and the 1874 Conveyance all used express language of cession to transfer land from the Tribe to the United States in return for a fixed sum. The 1882 Act, by contrast, merely authorized the Secretary of the Interior to make land available for sale to settlers at a minimum price, with the proceeds to "be placed to the credit of" the Tribe. J.A. 229. "This reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." *Solem*, 465 U.S. at 473. That conclusion is reinforced by comparing the 1882 Act to the nearly identical provisions of the 1872 Act, which, petitioners admit, did not diminish the Reservation.

B. Nor do the course of negotiations with the Tribe or congressional debates on the 1882 Act provide the "unequivocal[]" evidence necessary to demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. To the contrary, they show that Congress intended for the 1882 Act to accomplish the same objectives as the 1872

Act, which Congress did not understand to have resulted in diminishment. And changes made to the statutory language during the legislative process render petitioners' reading even less plausible.

C. Finally, the subsequent treatment of reservation lands and the pattern of settlement, while "rife with contradictions and inconsistencies," *Solem*, 465 U.S. at 478, generally support the conclusion that Congress intended the 1882 Act to leave the Omaha Reservation's borders intact. In the years following its passage, Congress extended the payment period for lands made available for sale under the Act five times, each time making clear that the Tribe possessed a continuing stake in those lands. Contemporaneous Interior Department reports, as well as maps created by the federal government and Nebraska, repeatedly represented the Reservation's traditional, undiminished western border. Although the settler population in the disputed area increased as a result of the 1882 Act, so did its Indian population.

More-recent evidence, although it cannot speak to what Congress intended in 1882, points in the same direction. Most notably, the State has "retroceded" to the federal government most of its congressionally delegated criminal jurisdiction over land in the Omaha Reservation. Officials on both sides understood that retrocession to encompass all of Thurston County, including the western border it shares with the Reservation.

II. Petitioners argue that the "justifiable expectations" of non-members within the disputed area should "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214-215, 219

(2005). But the only question at issue here is whether Congress's intent to diminish the Omaha Reservation is "clear and plain." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citation omitted). Because it is not, the Court should affirm.

ARGUMENT

I. THE 1882 ACT DID NOT DIMINISH THE OMAHA RESERVATION

The Constitution gives Congress plenary authority over Indian affairs, "including the power to modify or eliminate tribal rights." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Just as Congress alone may reserve land for tribal use, "only Congress can alter the terms of an Indian treaty by diminishing a reservation." *Ibid.* Accordingly, the status of disputed land is not a matter of property law, but one of statutory law: "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).

To determine whether a particular congressional enactment caused a reservation to be diminished, this Court's precedents "have established a fairly clean analytical structure." *Solem*, 465 U.S. at 470. First, "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994). Unmistakable language of diminishment is not required, but the statute must "establish an express congressional purpose to diminish." *Ibid.* (brackets and citation omitted).

Second, courts may also look to "the historical context surrounding the passage" of the legislation, to the extent that it sheds light on "the contemporaneous understanding of the particular Act" at issue. *Hagen*, 510 U.S. at 411. Probative evidence may include "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports." *Solem*, 465 U.S. at 471. Where those sources "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," diminishment may be found if the statute's language is otherwise inconclusive. *Ibid.*

Once a court has reviewed the statute's text and context, the court will normally be in a position to resolve the diminishment question: If "both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [courts] are bound * * * to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. Nevertheless, a court may, "to a lesser extent," rely on "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux*, 522 U.S. at 344. While those considerations are "an unorthodox and potentially unreliable method of statutory interpretation," they may provide "one additional clue as to what Congress expected." *Solem*, 465 U.S. at 472 & n.13.

When considering whether an Act of Congress diminished a reservation, the ultimate "touchstone" is "congressional purpose." *Yankton Sioux*, 522 U.S. at 343; see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977) ("The underlying premise is that congres-

sional intent will control."). That purpose must be "clear and plain" before a court will conclude that Congress intended to "alter the terms of an Indian treaty by diminishing a reservation." *Yankton Sioux*, 522 U.S. at 343 (citation omitted); see *Solem*, 465 U.S. at 470 ("Diminishment * * * will not be lightly inferred."). "Throughout the inquiry," moreover, a court must "resolve any ambiguities in favor of the Indians," *Hagen*, 510 U.S. at. 411, a rule that is given "the broadest possible scope" in diminishment cases, *DeCoteau* v. *District Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

In this case, the district court determined, and the court of appeals agreed, that Congress did not intend the 1882 Act to diminish the Omaha Indian Reservation. That conclusion is compelled, first and foremost, by the text of the Act; it is also supported by "the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends." Pet. App. 7. Petitioners cannot overcome "[t]he presumption that Congress did not intend to diminish the reservation." *Solem*, 465 U.S. at 481.

A. The Text Of The 1882 Act Demonstrates That Congress Did Not Intend To Diminish The Omaha Reservation

1. "We begin with the Act's operative language." *Solem*, 465 U.S. at 472. Unlike prior agreements between the Omaha Tribe and the United States, the 1882 Act did not purport to transfer land from the Tribe to the government. Rather, the Act "authorized" the Secretary of the Interior "to cause [land within the Reservation] to be surveyed, if necessary, and sold" to settlers. J.A. 227. Nor did Congress set a fixed sum for the opened area. Instead, it provided

for an appraisal process involving "three competent commissioners, one of whom [would] be selected by the Omaha tribe." *Ibid.* Land could be sold at its appraised value or $2.50 per acre, whichever was greater. J.A. 228-229. "[T]he proceeds of [each] sale," moreover, were to be "placed to the credit of" the Tribe into a Treasury account—after deducting the cost of "expenses incident to and necessary for carrying out" the Act. J.A. 229. Those provisions strongly indicate that "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation," with the United States "acting as guardian and trustee for the Indians" for purposes of the sale. *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962); see *Solem*, 465 U.S. at 473 ("[R]eference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent.").

The intent of the 1882 Act is even clearer when contrasted with the 1854 and 1865 Treaties and the 1874 Conveyance, all of which had involved the sale of Omaha lands to the United States in return for payment of a fixed sum. This Court has explained that a congressional enactment normally contains sufficient indicia of diminishment when "language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe" with a fixed sum. *Solem*, 465 U.S. at 470. The three prior land transfers fit that mold. The 1854 Treaty provided that the Tribe agreed to "cede to the United States," and "forever relinquish all right and title to," certain land "[i]n consideration of" $840,000. J.A. 1020, 1022. The 1865 Treaty provided that the Tribe would "cede, sell,

and convey" some of its land to the United States "in consideration of" $50,000. J.A. 1015. And the Omahas agreed, in the 1874 Conveyance, to "grant, bargain, sell and convey to the United States * * * all the[ir] right, title and interest" in certain land "in consideration" of $30,868.87. 1874 Conveyance 839-840. All three land transfers thus employed language "precisely suited to th[e] purpose" of diminishment, *Rosebud Sioux*, 430 U.S. at 592 (citation omitted), indicating that "Congress was fully aware of the means by which [diminishment] could be effected," *Mattz* v. *Arnett*, 412 U.S. 481, 504 (1973). The lack of any similar language in the 1882 Act speaks volumes.

Also telling is Congress's decision to open for settlement only the "unallotted lands" lying west of the right of way. J.A. 227. Although a small number of allotments to Omaha tribal members had been made pursuant to the 1865 Treaty, all were on the eastern portion of the Reservation. J.A. 331, 898. At the time of the 1882 Act, therefore, none of the area to be opened for sale had previously been allotted. The 1882 Act's reference to the sale of "unallotted lands" clearly contemplates that its allotment provisions would be carried out *before* the remaining lands could be appraised or sold—hence the instruction, by the Commissioner of Indian Affairs, that the officer overseeing the allotment process should "determine whether any tribal members wanted allotments west of the railroad right of way, so that appraisal of land to be sold could move forward." J.A. 344-345. Indeed, the 1882 Act expressly permitted members of the Tribe to select their allotments "in any part of [the] reservation *either east or west of [the] right of way*." J.A. 233 (emphasis added). That grant of "permis-

sion" for tribal members "to obtain individual allotments on the affected portion of the reservation before the land was officially opened to non-Indian settlers" further indicates that Congress "anticipate[d] that the opened area would remain part of the reservation." *Solem*, 465 U.S. at 474.

The 1882 Act contains other indications that Congress did not intend for the area opened for sale to lose its Reservation status. Unlike other surplus land statutes enacted around the same time, the 1882 Act did not provide that the lands opened for settlement would be "restored to the public domain." *Hagen*, 510 U.S. at 412 (emphasis and citation omitted); see *id.* at 413 ("Statutes of the period indicate that Congress considered Indian reservations as separate from the public domain."). Nor did the 1882 Act provide for purchased lands to be settled "under the homestead and townsite laws of the United States." *DeCoteau*, 420 U.S. at 442 (citation omitted). Rather, the 1882 Act provides for "settlement under such rules and regulations as [the Secretary of the Interior] may prescribe," J.A. 227, and it states that "patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts," J.A. 229. That language is significant, because it indicates Congress's view that settlers who purchased land under the 1882 Act were not buying public lands and thus were "a different class of settlers from those under the [existing] homestead laws." *Opinion by Assistant Att'y Gen. Van Devanter to the Sec'y of the Interior*, 30 Pub. Lands Dec. 82, 83 (D.O.I. 1900); see *ibid.* ("[I]t seems clear that settlers under [the 1882 Act] are not 'settlers under the homestead laws of the United States.'").

Finally, Congress's intent becomes even clearer when the 1882 Act is compared to its predecessor. The 1872 Act was Congress's first attempt to raise funds for the Omaha Tribe by opening a portion of its lands to settlement. See p. 3, *supra*. The earlier Act "authorized" the Secretary of the Interior "to cause to be surveyed, if necessary," 50,000 acres on the western side of the Reservation and to sell the land in lots of up to 160 acres. J.A. 631. It provided for appraisal by "three competent commissioners, one of whom shall be selected by [the] Omaha tribe," and it set a minimum sale price at the appraised value of the land or $1.25 per acre, whichever was greater. *Ibid.*; see J.A. 632. It also provided that proceeds from the sale should be "placed to the credit of" the Tribe into a Treasury account (after deducting a portion to be used for the Tribe's benefit). J.A. 632. The 1872 Act was plainly the model on which the land-opening provisions of the 1882 Act were based.

That conclusion has important implications for reading the later enactment, because petitioners have never argued that the 1872 Act diminished the Omaha Reservation. Nor would such a contention be sustainable. Indeed, had the 1872 Act *already* placed outside the Reservation's borders the 50,000 acres it opened for sale, petitioners could not argue, as they do now, that the 1882 Act was to "intended to alter the Reservation's boundaries" by opening much of the same land for sale. Br. 38 (capitalization and emphasis omitted). It would likewise make no sense for Congress to compensate the Tribe for the sale of lands that had already passed from tribal control; nor would Congress have specified that members of the Tribe could select their allotments "in any part of [the] res-

ervation either east or west of [the] right of way." J.A. 233. And, because the 1872 and 1882 Acts used different lines to mark the eastern boundary of the 50,000 acres offered to settlers—the former used a north-south line, while the latter relied on the diagonally sloping railroad right of way—a portion of the land opened for sale in 1872 was *not* available for sale under the 1882 Act. See p. 4, *supra*. Such land could not have been removed from the Reservation in 1872 yet, without further congressional action, still be part of the Reservation in 1882. It is therefore safe to conclude what petitioners have never disputed: The 1872 Act did not affect the Reservation's borders. See J.A. 573 (petitioners' expert stating that the 1872 Act "did not itself result in an actual diminishment of the Omaha Reservation").

But if Congress did not intend for land-opening language in the 1872 Act to diminish the Reservation, there is no reason to read nearly identical provisions in the 1882 Act to have that effect. See *Rosebud Sioux*, 430 U.S. at 588 (Court should ascribe the same effect to "language with respect to the reservation status of the opened lands [that is] identical with or derivative from the language used in" an earlier agreement that Congress did not approve.). Moreover, by the time it considered the 1882 Act, Congress knew that the 1872 Act had failed to result in the sale of significant acreage within the opened area. See Pet. App. 23. Although Congress and the Tribe were hopeful that another attempt would bear greater fruit, see pp. 29-31, *infra*, they must have contemplated the possibility that the second effort might prove similarly unsuccessful. Because Congress chose to reuse language that had not previously resulted in significant

sales within the opened area, that language likewise did not change the *status* of all the opened land. Nor, given the lack of success of the 1872 Act, would the Tribe have agreed that the 1882 Act would constitute a complete cessation of a portion of its Reservation.

In sum, when drafting the 1882 Act, Congress had before it two very different models for dealing with Omaha lands: the model it had followed in adopting the 1854 and 1865 Treaties and the 1874 Conveyance, in which the Tribe agreed immediately to "cede" and "convey" to the United States its rights in return for a fixed sum; and the model it had followed in adopting the 1872 Act, in which land was opened for future sale to settlers at a minimum price. Congress chose the latter, and that choice should be given effect. See *Duncan Energy Co.* v. *Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1297 (8th Cir. 1994) ("It would be contrary to the principle of resolving ambiguities in favor of the Indians were we to conclude that Congress intended the same meanings for the vastly different language employed in these two documents affecting the Tribe."), cert. denied, 513 U.S. 1103 (1995).

2. This Court's prior decisions confirm that the 1882 Act should not be read as an expression of congressional intent to diminish the Omaha Reservation. In finding that Congress diminished a reservation or terminated its reservation status, the Court has relied on explicit language designed to achieve that purpose. Thus in *Yankton Sioux*, the relevant legislation called for the tribe to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to" the disputed land. 522 U.S. at 344 (citation omitted). The treaty at issue in *DeCoteau*

contained identical language. See 420 U.S. at 445. In *Rosebud Sioux*, the tribe signed an agreement promising to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" to certain lands in exchange for $1,040,000. 430 U.S. at 591 & n.8. Although Congress did not approve that agreement, within a few years Congress passed legislation intended to ensure that the agreement's "purpose was carried forth and enacted." *Id.* at 592; see *id.* at 598 (statute intended to "accomplish the same result" as the earlier agreement). Those cases also all involved payment of a "sum certain" to the tribe in return for the abandonment of its land rights. See *Yankton Sioux*, 522 U.S. at 344 ("the United States pledges a fixed payment of $600,000"); *DeCoteau*, 420 U.S. at 441 ("$2,203,000 to pay the tribe for the ceded land"). This Court has explained that language of cession, when paired with the promise of a fixed payment, is "precisely suited" to alter the status of tribal lands, *DeCoteau*, 420 U.S. at 445, and that such statutes lie "[a]t one extreme" of the interpretive spectrum, *Solem*, 465 U.S. at 469 n.10.[4]

The express language of cession and conveyance relied upon in those decisions closely mirrors language used in the 1854 and 1865 Treaties and the 1874 Conveyance. See J.A. 1020 (1854 Treaty: "cede" and "forever relinquish all right and title"); J.A. 1015 (1865 Treaty: "cede, sell, and convey"); 1874 Conveyance 840 ("grant, bargain, sell and convey * * * all

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[4] In *Hagen*, the Court relied on "operative language" providing that "'all the unallotted lands within [the] reservation shall be restored to the public domain.'" 510 U.S. at 412 (emphasis omitted). The Court said that language was "inconsistent with the continuation of reservation status." *Id.* at 414.

the right, title and interest"). All three also provided for payment of a fixed amount in return for the cession to the United States.

The 1872 and 1882 Acts, by contrast, contained no language of cession; did not provide for conveyance to the United States; and did not compensate the Tribe with payment of a sum certain. Instead, the operative language of those statutes—by authorizing the Interior Secretary to make land available for sale, with the proceeds placed to the credit of the Tribe—is functionally identical to the language at issue in cases where this Court has held that tribal lands were not diminished.

In *Solem*, for example, Congress "authorized and directed" the Secretary "to sell and dispose of" a portion of two reservations, with the proceeds to be placed into a Treasury account "to the credit of the Indians." 465 U.S. at 472-473 (citation omitted). The statute at issue in *Seymour* "authorized and directed" the Secretary "to sell and dispose of unallotted lands" and to "open [such lands] to settlement and entry." Act of Mar. 22, 1906, ch. 1126, §§ 1, 3, 34 Stat. 80-81. The statute also "provide[d] that the proceeds from the disposition of lands affected by its provisions [would] be 'deposited in the Treasury of the United States to the credit of'" the tribe. *Seymour*, 368 U.S. at 355. And in *Mattz*, Congress declared that the disputed lands would "be subject to settlement, entry, and purchase," with "the proceeds arising from the sale of [the] lands * * * to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians." 412 U.S. at 495 (citation omitted). Those statutes, like the 1872 and 1882 Acts, "merely open[ed] lands to settlement

* * * by establishing a fund dependent on uncertain future sales of [tribal] land to settlers." *DeCoteau*, 420 U.S. at 448. They accordingly lie "[a]t the other extreme" of the spectrum, where a court is bound to conclude that "the Act simply opened a portion of the * * * Reservation to non-Indian settlers and did not diminish the reservation." *Solem*, 465 U.S. at 469 n.10.

3. Petitioners identify no language demonstrating a clear intent to diminish the Omaha Reservation. And to the extent that petitioners even address the language of the 1882 Act (Br. 46-51), their arguments are unpersuasive.

First, petitioners contend (Br. 47) that the language opening the disputed area to settlement, by itself, constitutes evidence of intent to diminish. That assertion would hold true "only if continued reservation status were inconsistent with the mere opening of lands to settlement, and such is not the case." *DeCoteau*, 420 U.S. at 447. To the contrary, "[t]he mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud Sioux*, 430 U.S. at 586-587. Petitioners also ignore that the statutes at issue in *Solem*, *Mattz*, and *Seymour*—decisions in which this Court found no intent to diminish—all contained language opening a portion of tribal lands for sale and settlement. See pp. 24-25, *supra*. Indeed, as noted above, the Court has described statutes "authoriz[ing] the Secretary of the Interior 'to sell or dispose of' unallotted lands" as being "[a]t the other extreme"—*i.e.*, far removed from indicating an intent to diminish. *Solem*, 465 U.S. at 469 n.10 (citation omitted).

Second, petitioners observe (Br. 47) that, in the years following adoption of the 1882 Act, "Congress authorized the Secretary of the Interior, with the consent of the Tribe, to extend the non-Indian settlers' payment period on multiple occasions." Of course, "later enacted laws * * * do not declare the meaning of earlier law." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998). Later-enacted legislation may bear, however, on the third *Solem* factor: "subsequent treatment of the * * * Reservation by Congress." 465 U.S. at 478. But as explained below, see pp. 38-39, *infra*, the statutes that petitioners cite in fact "suggest[] the continued reservation status of the disputed lands." Pet. App. 72.

Third, petitioners deem it "significant" (Br. 49) that Congress chose not to withhold a portion of the opened lands for continued use by the Tribe or to "carve out" mineral or land rights on its behalf. In *Solem*, petitioners note, the Court pointed to such features as supporting the conclusion "that the unallotted opened lands would for the immediate future remain an integral part of the * * * Reservation." 465 U.S. at 474. But the statutes in *Seymour* and *Mattz* contained no such reservation of rights; to the contrary, both statutes explicitly "provided for the sale of mineral lands" to non-members. *Seymour*, 368 U.S. at 354-355; see *Mattz*, 412 U.S. at 495 ("authorizing the sale of mineral, stone, and timber lands") (citation omitted). The Court nevertheless concluded in each case that the statutory language did not support a finding of diminishment. The Court's reliance in *Solem* on language reserving land and mineral rights in the opened area was necessary, moreover, to overcome "difficult" statutory language that "refer[red] to

the unopened territories as 'within the respective reservations thus diminished'" and permitted tribal members to harvest timber in the opened area "'only as long as the lands remain part of the public domain.'" 465 U.S. at 474-475; see *id.* at 475 ("[W]hen balanced against the Cheyenne River Act's stated and limited goal of opening up reservation lands for sale to non-Indian settlers, these two phrases cannot carry the burden of establishing an express congressional purpose to diminish"). The 1882 Act contains no such "difficult" language.

Finally, petitioners contend (Br. 49-50) that Congress had no cause to employ "explicit cession language in the 1872 and 1882 Acts" because "members of the Tribe did not reside [i]n the disputed area." That argument confuses two distinct concepts. "[C]ession" refers to "[t]he act of relinquishing *property rights*," *Black's Law Dictionary* 276 (10th ed. 2014) (emphasis added), and does not require the person ceding his right to land to physically inhabit the area beforehand or to vacate it afterwards. In addition, although members of the Omaha Tribe did not reside west of the railroad right of way prior to passage of the 1882 Act, they "continued to hunt on the prairies west of Logan Creek and considered the region to be an integral part of their reservation." J.A. 898; see *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835) (considering Indian title in Florida: "[T]heir hunting grounds were as much in their actual possession as the cleared fields of the whites."). Had Congress intended to divest the Tribe entirely of those traditional rights, rather than to sell the land on the Tribe's behalf, it would have employed clear language of cession. And petitioners' argument (Br. 51)

that Congress was waiting "to transfer full and complete title" to the land until "the land was either allotted to tribe members or settled upon and sold to non-Indians" is beside the point. A reservation's borders do not depend on the title status of individual plots within it: "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

B. The Historical Context and Legislative History Of The 1882 Act Do Not Demonstrate An Intent To Diminish The Omaha Reservation

The text of the 1882 Act, which is "[t]he most probative evidence of congressional intent," *Solem*, 465 U.S. at 470, makes clear that Congress did not intend to diminish the Omaha Reservation. That alone should suffice. See *Hagen*, 510 U.S. at 411 ("[T]he statutory language must establish an express congressional purpose to diminish.") (brackets and citation omitted); *Solem*, 465 U.S. at 470 ("Our analysis of surplus land Acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found.") (ellipses, citation, and internal quotation marks omitted).

In determining whether a reservation has been diminished, the Court has also considered extra-textual sources such as legislative history, but those sources may support diminishment only where they "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471; see *Yankton Sioux*, 522 U.S. at 351

("[U]nequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished."). No such "unequivocal" evidence exists in this case.

1. In December 1881, Alice Fletcher (who later administered the 1882 Act's allotment provisions, see p. 6, *supra*) met with Omaha tribal leaders, "who asked her for a 'strong paper' or act of Congress to guarantee their lands and prevent their removal to Indian Territory." J.A. 908. Fletcher interpreted that request to mean "they were asking for legal title to their allotments," and she "helped them draft and send a petition to Congress." J.A. 908-909. The petition, submitted on behalf of 53 members of the Tribe, asked Congress to grant "clear and full title" to their allotted lands. S. Misc. Doc. No. 31, 47th Cong., 1st Sess. 1 (1882); see *id.* at 1-2.

Meanwhile, Senator Saunders introduced a bill providing for the sale of 50,000 acres of Omaha land. The bill stated that the land opened for sale would be "separated from the remaining portion of [the] reservation by a line running * * * from north to south." S. 200, 47th Cong., 1st Sess. 1 (1881). That language directly mirrored language in the 1872 Act. J.A. 631. When the bill was reported by the Committee on Indian Affairs (now numbered as S. 1255), Senator Saunders explained that the bill would "authorize[] the sale of not exceeding fifty thousand acres, to be taken from the west part of the Omaha reservation." J.A. 644; see S. 1255, 47th Cong., 1st Sess. 1 (1882); see also J.A. 909. A lengthy debate followed that touched on a number of topics, most pointedly a provision that would have exempted "patents issued to Indians" from "incumbrance and

taxation" by the State. J.A. 647; see J.A. 647-678. After a number of amendments were added to the bill, see, *e.g.*, J.A. 910, it was passed by the Senate on April 20, 1882. J.A. 916.

The Senate bill was referred to Committee in the House of Representatives. J.A. 916. When it was returned to the House floor, it had been almost entirely rewritten. Among other things, the House version provided for the allotment of land to members of the Tribe, and it used the railroad right of way—rather than the north-south line employed by the 1872 Act—to mark the area opened for sale. It also eliminated the statement that the area opened for sale would be "separated" from the rest of the Reservation. J.A. 1308; see J.A. 1307-1316 .

During the ensuing debate in the House, a dispute arose among several Representatives about whether the "best lands" on the Reservation lay east or west of the right of way. 13 Cong. Rec. 6540 (1882) (Rep. Scales); see *id.* at 6540-6541 (Reps. Haskell, Scales, and Valentine). Representative Holman resolved the impasse by offering an amendment allowing tribal members to choose allotments "in any part of [the] reservation either east or west of [the railroad] right of way." *Id.* at 6541; see J.A. 925. The amended bill was passed by the House on July 27, 1882. J.A. 925-926. The Senate approved the House version without change, and President Arthur signed it into law on August 7, 1882. J.A. 926.

2. The negotiations and legislative discussions leading up to adoption of the 1882 Act do not "reveal a contemporaneous understanding that the proposed legislation" was intended to "modif[y] the reservation." *Yankton Sioux*, 522 U.S. at 352. Instead, to the

extent that they shed any light, it is to confirm the Act's express goals: to make land available for sale, to raise money for the Tribe, and to provide members of the Tribe with "clear and full title" to their allotted land. Pet. App. 64; see *id.* at 63-65. The record is devoid of any "specific discussion of how, if at all, the 1882 Act would impact Omaha Reservation boundaries or whether the Act would transfer the Omaha Indians' tribal sovereignty in a particular geographic area." *Id.* at 65; see *ibid.* (finding no evidence that Congress intended to "diminish or alter the boundaries of the Omaha Reservation, as opposed to merely authorize the sale of reservation land to non-Indian settlers for the Omaha Tribe's benefit").

The absence of any discussion of diminishment here stands in stark contrast to decisions in which this Court has found evidence of a widely held understanding that a reservation's borders were to be altered. In *Rosebud Sioux*, for example, a federal negotiator told the tribe that its cession of certain lands "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 591-592 (citation omitted). Similarly, the federal negotiator in *Hagen* informed the tribe that "congress has provided legislation which will pull up the nails which hold down that [boundary] line and *after next year there will be no outside boundary line to this reservation*." 510 U.S. at 417. In *Yankton Sioux*, a report from the Yankton Commission "signaled [the Commissioners'] understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation," and tribal leaders "concurred" in that understanding in a letter to Congress. 522 U.S. at 353.

Petitioners do not identify any similar discussion of anticipated changes to the boundaries of the Omaha Reservation. Instead, petitioners point (Br. 5-6) to two remarks made on the Senate floor that supposedly support their position. Petitioners' "reliance on * * * comments made on the floor of the [Senate] is not well placed," because "the [House] version" of S. 1255 "was substituted for that of the [Senate]." *Mattz*, 412 U.S. at 503-504. But even on their own terms, those statements do not have the significance that petitioners ascribe to them.

First, petitioners repeatedly refer (Br. 5-6, 42, 45) to a statement by Senator Ingalls objecting to language exempting land held by tribal members from state taxation. Senator Ingalls disputed Congress's constitutional authority to achieve that result and proposed that the taxation language be stricken. J.A. 647-648. A long debate on the tax question followed. See, *e.g.*, J.A. 647-679. During that debate, Senator Ingalls stated that the bill "practically breaks up that portion at least of the reservation which is to be sold." J.A. 647. He also stated that the lands presently occupied by members of the Tribe, as to which the bill would allow them to acquire title, "are segregated from the remainder of the reservation." *Ibid.*

Those statements cannot bear the weight petitioners place on them. The statement by Senator Ingalls that S. 1255 "*practically* breaks up" the Reservation is, as it purports to be, a statement about the bill's practical effect, not its consequences for the Reservation's formal boundaries. And in referring to lands occupied by tribal members as being "segregated," Senator Ingalls was addressing the question whether the United States would retain jurisdiction to exempt

land held by individual allottees from state taxation. Senator Ingalls was firmly of the view that it would not. See J.A. 647 ("The lands that they occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished."); see also J.A. 648 ("The question is whether this land, being so held, the Government having relinquished its jurisdiction, it is competent for Congress" to "exempt [it] from taxation."). Senator Ingalls was suggesting a distinction between lands owned by the Tribe collectively (which could be exempted from state taxation) and those held by individual members based on "private title from the Government" (which he thought could not be exempted). J.A. 647. He was not distinguishing between lands to be opened for sale and those unavailable for sale.[5]

Second, petitioners rely (Br. 42) on a statement by Senator Dawes, who expressed concern that the sale of the lands "would leave the reservation too small." J.A. 683. As this Court has recognized, statements of that type often "allud[e] to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers," rather than "the reduction that a complete cession of tribal interests in the opened area would precipitate." *Solem*, 465 U.S. at

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[5] For the same reason, petitioners err in relying on the phrase "the interest and control and jurisdiction of the United States is absolutely relinquished." Br. 31 (emphasis omitted). The entire sentence makes clear that Senator Ingalls was arguing that the United States would lose jurisdiction over "the allottees [who] receive patents to the[ir] separate tracts." J.A. 647. That statement had nothing to do with the land to be opened for sale.

478. Indeed, in *Solem* the Court refused to give weight to statements in "[b]oth the Senate and House Reports [that] refer to the 'reduced reservation' and state that 'lands reserved for the use of the Indians upon both reservations as diminished are ample for the present and future needs of the Indians of the respective tribes.'" *Ibid.* (ellipses and citations omitted); see *id.* at 475 n.17. The Court considered those statements to be "isolated and ambiguous" and concluded that "it [wa]s impossible to infer from" them "a congressional purpose to diminish the Cheyenne River Sioux Reservation." *Id.* at 478. In any event, the context here makes clear that Senator Dawes was addressing the acreage available to the Omahas to select allotments for themselves and the acreage left over for future allotments to their children. J.A. 683-684 (referring to the "increase of numbers as might probably be expected in the next twenty-five years"). Nothing indicates that he was referring instead to "a complete cession of tribal interests." *Solem*, 465 U.S. at 478.

3. Petitioners also rely on the 1872 Act and the circumstances surrounding its enactment, which, petitioners contend (Br. 40), are "very much a part of the legislative history of the 1882 Act." But considering the 1882 Act in the context of the 1872 Act only strengthens the conclusion that Congress did not intend to diminish the Omaha Reservation.

First and foremost, as noted above, it is undisputed that the 1872 Act did not diminish the Reservation. See pp. 20-21, *supra*. The debate on the 1882 Act makes clear, moreover, that Congress viewed the Reservation's boundaries as including the land west of the railroad right of way. See, *e.g.*, J.A. 459 ("[T]he

Omaha Indians have the whole reservation."); J.A. 644 ("The bill authorizes the sale of not exceeding fifty thousand acres, to be taken from the west part of the Omaha reservation."); J.A. 655 ("[U]nderlying all this," based on "treaty stipulations with these Indians," is the fact "that any one of them can go on any part of all the present reservation."); J.A. 707 ("[T]he Sioux City and Nebraska Railroad * * * runs through their reservation."). Therefore, if petitioners are correct (Br. 41) that "[t]he 1882 Act was nearly identical to the 1872 Act, both in its terms and objectives," then the effect of each Act on the Reservation's boundaries—or lack thereof—should be the same.[6]

Petitioners nevertheless point to features of the 1872 Act and its adoption that they argue support a finding of congressional intent to diminish. Petitioners rely (Br. 40) on the 1872 Act's provision for the survey of 50,000 acres "to be taken from the western part" of the Reservation and "to be separated from the remaining portion of [the] reservation by a line running * * * from north to south." J.A. 631. The word "separated" in the 1872 Act did no more than mark the boundary between land made available for sale and land not thus available. But even assuming

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[6] For the same reason, petitioners fail in their effort (Br. 39) to analogize the relationship between the 1872 and 1882 Acts to the relationship between the earlier and later statutes relied upon in *Rosebud Sioux* and *Hagen*. In *Rosebud Sioux*, a 1901 agreement signed by the tribe but not approved by Congress had an "unmistakable baseline purpose of disestablishment" that "was carried forth and enacted" in a 1904 statute. 430 U.S. at 592. In *Hagen*, a 1902 statute established a "baseline intent to diminish" that "survived the passage of" a statute adopted three years later. 510 U.S. at 415. Here, by contrast, if the 1872 Act established a "baseline purpose" or "intent," it was one of non-diminishment.

that the phrase "'separated from the remaining portion of [the] reservation'" had "any legal relevance, then equally significant is Congress's decision to remove the word and phrase from the 1882 Act." Pet. App. 67. As noted above, the House of Representatives substantially rewrote the bill that became the 1882 Act and changed a number of its provisions—including the phrase relied upon by petitioners. See J.A. 1307-1308; see also p. 30, *supra*.

Petitioners also err in relying (Br. 39-40) on a statement, made in January 1872 by the Commissioner of Indian Affairs, that "the general idea of diminishing these reservations for the purpose of securing higher cultivation of the remaining lands, is consonant with sound policy." J.A. 194. As this Court has explained, at that time, "'diminished' was not yet a term of art in Indian law." *Solem*, 465 U.S. at 475 n.17. The Commissioner "may well have been referring to diminishment in common lands and not diminishment of reservation boundaries." *Ibid.* In *Solem*, the very statute at issue referred to "'the reservation thus diminished'" and also referred to opened lands as being "'part of the public domain.'" *Id.* at 475. Yet the Court deemed those to be "isolated phrases" that were "hardly dispositive." *Ibid.* In any event, even if the Commissioner's remarks provide meaningful context for interpreting the 1872 Act, that Act did not use any form of the word "diminish," and neither did the 1882 Act.

In sum, petitioners have failed to identify evidence that would "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. Nor have petitioners

explained how the 1872 Act, which admittedly did not change the boundaries of the Omaha Reservation, supports their reading of the 1882 Act.

C. The Subsequent Treatment Of The Area And The Pattern Of Settlement Do Not Support A Finding Of Diminishment

Where, as here, "both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts are "bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. Nevertheless, the Court may look to "the subsequent treatment of the area in question and the pattern of settlement there," to the extent that they shed light on the "touchstone" of the diminishment inquiry—namely, "congressional purpose." *Yankton Sioux*, 522 U.S. at 343-344; see *Solem*, 465 U.S. at 472 ("one additional clue as to what Congress expected").

Petitioners no longer argue, as they did in seeking this Court's certiorari review, that the decisions by the courts below in this case "preclude[d] proper consideration of * * * the jurisdictional history and subsequent treatment of the [disputed] area." Pet. 10; see Pet. i, 9. That concession is wise. The district court found, and the court of appeals agreed, that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." Pet. App. 72. The historical record, while "rife with contradictions and inconsistencies," *Yankton Sioux*, 522 U.S. at 356, generally supports the conclusion that Congress in-

tended the 1882 Act to leave the Reservation's borders intact.

1. Congress

The most probative post-enactment evidence of congressional intent is "Congress' own treatment of the affected areas, particularly in the years immediately following the opening." *Solem*, 465 U.S. at 471. In this case, Congress passed several statutes modifying the 1882 Act, all of which demonstrate its understanding that the 1882 Act had not diminished the Omaha Reservation.

The first statute, passed only three years after the 1882 Act, authorized the Secretary of the Interior to extend the time period for settlers to pay for their land purchases. Notably, the statute required the Secretary to obtain "the consent of the Indians," suggesting that Congress understood the Tribe as retaining an interest in the area that had been opened for sale. 1885 Act, 23 Stat. 370. The statute also opened for sale "that portion *of [the] reservation* in township twenty-four, range seven east." *Ibid.* (emphasis added). The 1882 Act had identified that entire block—which was divided in half by the railroad right of way—as eligible for sale if any of it remained unallotted on June 1, 1885. J.A. 229; see J.A. 1306 (map); see also note 1, *supra* (defining township and range).

Over the next decade, Congress passed four more statutes extending the time period for payment by settlers. Each time, Congress referred to the lands opened for purchase as "Omaha lands" or "on the Omaha Indian Reservation." 1886 Act, 24 Stat. 214 ("who have settled or shall settle upon said Omaha lands"); 1888 Act, § 2, 25 Stat. 150 ("land sold on

Omaha Indian Reservation"); 1890 Act, § 1, 26 Stat. 329 ("land sold on the Omaha Indian reservation"); 1894 Act, 28 Stat. 276 ("land sold on the Omaha Indian Reservation"). The House Report on the 1890 extension explained that an earlier version of the legislation had contained a provision that would have authorized Nebraska to tax the purchased lands immediately, prior to issuance of a patent in fee. The President vetoed that version due to concern that the state tax provision "might endanger the title of the Indians to the land in case of sale for taxes," and so Congress removed the objectionable provision. C.A. App. 2410 (H.R. Rep. No. 2684, 51st Cong., 1st Sess. (1890)). And the 1894 Act, like the 1885 extension, provided that the extension would not take effect unless "the consent thereto of the Omaha Indians shall be obtained." 28 Stat. 277. Those statutes all strongly indicate Congress's understanding "that the opened area was still part of the reservation." *Solem*, 465 U.S. at 479.

Petitioners nevertheless contend (Br. 47-48) that the 1888 extension statute supports their view, because Congress specified that, upon default for nonpayment, "a settler's tract [would] be sold at public auction, not revert back to the Tribe." § 3, 25 Stat. 151. But the purpose of the 1882 Act was to generate money for the Tribe's benefit; that goal required the lands to be resold, not returned to the Tribe. The 1888 Act specified, moreover, that "the proceeds of all such sales shall be covered into the Treasury, to be disposed of for the sole use of [the] Omaha Tribe of Indians." *Ibid.* As the district court observed, "[u]nder the 1888 Act, the United States merely con-

tinued to act as trustee for the Tribe so the Tribe gained the financial benefit of the sale." Pet. App. 71.

2. The Department of the Interior

Treatment of the disputed area by the Department of the Interior shortly after passage of the 1882 Act is mixed, but it also tends to support a finding that the Reservation was not diminished. In 1884, federal cartographers working for the Office of Indian Affairs mapped "the Boundary Lines of the Omaha and Winnebago Ind[ian] Res[ervation] in Nebraska." J.A. 1129 (capitalization altered); see J.A. 968. Their map shows the Omaha Reservation as originally created in 1854, minus the areas ceded for use by the Winnebago Tribe in 1865 and 1874, but undiminished by the 1882 Act. *Ibid.* Those borders are also consistent with reports subsequently submitted by the Omaha and Winnebago Agency, which describe the Reservations as "extend[ing] west 30 miles" from the Missouri River—that is, from the River to the Omaha Reservation's traditional western border. J.A. 798 (1890 Report); J.A. 817 (1892 Report); J.A. 830 (1897 Report); J.A. 1100 (1899 Report); see J.A. 495 (1885 Report) ("25 miles").[7] Finally, in June 1900, Willis Van Devanter, then Assistant Attorney General for the Interior Department and later a Member of this Court, submitted an opinion to the Secretary addressing whether settlers who purchased lands under the 1882 Act qualified as "settlers under the homestead

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[7] The Omaha Reservation's original western border, as established in an 1855 boundary survey report, is almost exactly 30 miles from the Missouri River at the Reservation's widest point (along its southern border). J.A. 127-128; see Neb. Rev. Rul. 99-92-1 (Mar. 6, 1992) (Omaha Reservation's southern border is 30.5 miles, "as established by [the] 1854 treaty").

laws of the United States." 30 Pub. Lands Dec. at 83. His opinion concludes that they did not, and it refers to them as "settlers under said section [*i.e.*, Section 2 of the 1882 Act] on lands embraced in the Omaha reservation." *Ibid.*

In response, petitioners offer three general sources of evidence purporting to indicate that "the United States * * * had absolutely relinquished all jurisdiction and control" over the disputed area. Br. 34. First, petitioners rely (Br. 13, 34-36) on three Interior Department maps that depict dozens of different Indian reservations throughout the United States on a single, nationwide map. J.A. 1298-1300. Those maps, on which the Omaha Reservation is barely visible, do not purport to show formally determined legal boundaries, and it is unclear what evidence was considered to generate them and what purpose they were intended to serve. Certainly they are less probative than the 1884 Office of Indian Affairs map of the Omaha Reservation itself.

Second, petitioners rely (Br. 12, 34-36) on Interior Department reports in which the acreage of the Omaha Reservation is listed. Petitioners contend (Br. 34) that the acreage figures are so low as to suggest that the disputed area was not included in the total. But those acreage figures are not persuasive for several reasons. As an initial matter, the figures do not indicate whether they refer to the total land within the Omaha Reservation's borders, or only to the land occupied by the Tribe. Moreover, the Interior Department's "[o]fficial reports from 1874 onward consistently treated the Omaha Reservation as having been diminished by 50,000 acres," J.A. 360 (petitioners' expert report), even though the 1872 Act did not

diminish the Reservation, see pp. 20-21, *supra*. Thus the 1874 report states that "[b]y the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale in trust for said Indians, leaving 143,225 acres as their diminished reserve." J.A. 504. Subsequent reports carry forward the same deduction. See, *e.g.*, J.A. 511, 517, 522. Finally, most of the reports also deducted the acreage of land allotted to members of the Tribe. See, *e.g.*, J.A. 517, 522, 525, 530-531. As a result, for example, the 1898 report lists the Reservation's "Area in acres" as 64,558, because that was the area that remained unallotted. J.A. 517.

Third, petitioners rely (Br. 11, 34-35) on various statements by federal Indian agents, some of which are inapposite. For instance, one agent simply stated, in regard to the Winnebago and Omaha Reservations, that "settlers surrounding these reservations are sober, industrious, intelligent, and frugal farmers." J.A. 490; cf. Pet. Br. 11. Other statements, which describe the Reservation as lying east of the railroad, appear to be taken primarily from individual letters, most of which are not themselves in the record. See J.A. 207, 605-607. Those statements are inconsistent with the Omaha and Winnebago Agency reports described above. The statements appear to be "merely passing references," and "not deliberate expressions of" the Executive Branch's "conclusions about congressional intent in [1882]." *Hagen*, 510 U.S. at 420 (citation omitted).

3. The State of Nebraska

Several contemporaneous state maps depict the disputed area as remaining within the Omaha Reservation's boundaries. An 1885 map, which was published in the Official State Atlas of Nebraska, shows

the area west of the right of way as being contained within the Reservation. J.A. 1306.[8] So does a detailed "outline map" for Cuming County from the 1908 Standard Atlas. J.A. 1303.[9] Maps of township plats within Cuming County depict land ownership in the western area of the Reservation—including tracts occupied by Indian allottees and non-Indian settlers, each identified by name—all bounded by the original, undiminished Reservation boundary lines. J.A. 1304 (Grant Township)[10]; J.A. 1305 (Bancroft Township).[11]

Perhaps even more significant, in 1889, "the Nebraska Legislature enacted legislation defining the geographical boundaries of Thurston County." J.A. 210. As a reference point, the legislature used "the south line of the Omaha Indian reservation, as originally surveyed." J.A. 210-211. In 1922, the legislature defined Thurston County's western boundary as running "along the Winnebago and Omaha Indian reservation line." J.A. 211. That definition, relying on the Reservation's traditional western border, remains in use today. See Neb. Rev. Stat. Ann. § 22-187 (LexisNexis 2011) ("west line of the Winnebago and Omaha Indian reservations").

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[8] Several of the maps in the Joint Appendix are available at higher resolution online. The 1885 map cited here is available at http://www.davidrumsey.com/maps11305-28917.html.

[9] http://www.loc.gov/resource/g4193cm.gla00166/?sp=5. When the map is magnified, the phrase "West Boundary Omaha Res." can be read along the Reservation's historical border.

[10] http://www.loc.gov/resource/g4193cm.gla00166/?sp=15.

[11] http://www.loc.gov/resource/g4193cm.gla00166/?sp=22.

4. The pattern of settlement

Petitioners rely heavily (Br. 24-30) on the fact that the population of the disputed area has been at least 90% non-Indian since settlers moved into the area following the 1882 Act. The pattern of settlement "is the least compelling [evidence of diminishment] for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet [the Court has] repeatedly stated that not every surplus land Act diminished the affected reservation." *Yankton Sioux*, 522 U.S. at 356. In any event, the circumstances here present a picture that is, as the district court found, "mixed." Pet. App. 76.

In 1882, no members of the Omaha Tribe were known to be living on the lands west of the right of way, lands the Tribe used primarily as a hunting ground. J.A. 898. Therefore, because several members of the Tribe selected allotments west of the right of way under the 1882 Act, that Act resulted in an *increase* in the Omaha population in the disputed area. Indeed, the tribal population west of the right of way more than quadrupled between 1900 and 1910, albeit only to a total of 72. J.A. 366. Demographics east of the right of way—that is, in the area that petitioners admit remained part of the Reservation—changed even more significantly. Non-Indians attained a majority no later than 1900; by the time the last parcel in the disputed area had been sold to a settler in 1913, see J.A. 206, non-Indians made up more than three-quarters of the population east of the right of way, J.A. 366. In sum, following passage of the 1882 Act, the Omaha population west of the right of way increased slightly, and the percentage of Oma-

has east of the right of way decreased substantially. The circumstances here are thus quite different from other decisions cited by petitioners (Br. 30), in which a significant, existing Indian population was displaced by settlers in the area opened for settlement.

It should be emphasized, however, that members of the Omaha Tribe have had a long and prominent presence west of the right of way. Many visited, resided in, and regularly conducted business in the newly established Village of Pender. J.A. 952. Tribal members also played prominent roles in the town's early settlement. Thomas Sloan, an attorney and member of the Omaha Tribe, maintained a residence and a law office in Pender; he also served as the Mayor of Pender, Surveyor of Thurston County, and Justice of the Peace. J.A. 952-953. Hiram Chase, another tribal member, resided and practiced law in Pender, where his children attended public schools; he also served as Thurston County Attorney for eight years before being elected as County Judge. J.A. 953. Sloan and Chase also argued cases in this Court. *United States* v. *Chase*, 245 U.S. 89 (1917); *Hallowell* v. *Commons*, 239 U.S. 506 (1916); *Hallowell* v. *United States*, 221 U.S. 317 (1911).

5. Treatment of the area from 1961 to the present

Much of petitioners' argument (Br. 17, 25, 28, 31-33, 36) focuses on present-day events and circumstances relating to the disputed area. While those come far too late to provide meaningful evidence of what Congress intended in 1882, they nevertheless also demonstrate the view, predominant among both the federal and state governments, that the disputed area lies within the Omaha Reservation.

a. The Interior Department has determined on multiple occasions that the boundaries of the Omaha Reservation were not diminished by the 1882 Act. A historical summary in 1961 stated that the 1865 Treaty and the 1874 Conveyance "are the only changes effected in the boundaries of the Omaha Reservation since its inception. The later enactments authorizing sale of various lands included within these boundaries are not considered to have had the effect of terminating Federal jurisdiction over them." J.A. 1071. A 1999 memorandum from the Aberdeen Area Director similarly found that the Reservation boundaries "have not been changed or altered" since the 1874 Conveyance. J.A. 1131. A lengthy analysis by the Interior Field Solicitor in 2008 concluded that the 1882 Act "does not evidence a diminishment of the reservation boundaries." J.A. 1248; see J.A. 1195-1249. Most recently, the Interior Associate Solicitor for Indian Affairs, in a thorough and authoritative memorandum prepared in 2012, confirmed that "the western boundary of the Omaha Reservation has not been diminished." J.A. 284; see J.A. 234-284.

One deviation from that consistent view, relied upon by petitioners (Br. 36), is a letter from the Twin Cities Field Solicitor in 1989. J.A. 1182-1194. The letter acknowledged that "on the basis of the [statutory] language alone diminishment was not the intent of Congress." J.A. 1187 (emphasis omitted). It nevertheless stated that the Reservation had undergone "de facto diminishment." J.A. 1190. But in addition to its legal shortcomings, the 1989 letter was based in part on an inaccurate factual record, including the erroneous statement that "no Indian trust allotments were made on lands lying west of the * * * right of way."

J.A. 1189 (emphasis omitted). The Interior Department explicitly disclaimed that analysis in 2012. J.A. 1250 ("The June 27, 1989 letter is hereby withdrawn and is not to be relied upon.").

b. Federal maps have varied in their depiction of the Omaha Reservation, but they primarily show it undiminished. Recent Interior Department maps show the disputed area as being within the Reservation's boundaries. J.A. 1133 (1995 map); J.A. 1134 (1999 map). The 2000 U.S Census Bureau map of Pender also locates the town within the Reservation's western boundary. J.A. 1137.[12] A 1994 Bureau of Indian Affairs map, while showing some of the disputed area as extending outside the Reservation boundary, depicts Thurston County and Pender as lying within it. J.A. 1130. Petitioners rely (Br. 36) on a 1964 map from the Aberdeen Area Office, which includes a note from an unknown author stating that the Reservation was diminished. J.A. 562-564. No explanation is provided for that statement, and the area described as having been diminished does not correspond to the area opened to settlement by the 1882 Act.

c. In addition, the State of Nebraska has formally relinquished to the United States its criminal jurisdiction over the Omaha Reservation in a manner that recognizes the Reservation's undiminished western boundary. In 1953, Congress enacted a statute, commonly known as Public Law 280, which trans-

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[12] U.S. Census Bureau, *Census 2000 Block Map: Omaha Reservation* (2000), http://www2.census.gov/geo/maps/blk2000/AIANHH/AIR_Federal/2550_Omaha/CBN2550_B01.pdf. See U.S. Census Bureau, *Census 2000 Block Map: Pender Village* (2000), http://www2.census.gov/geo/maps/blk2000/st31_Nebraska/Place/3138750_Pender/CBP3138750_001.pdf.

ferred to certain States the federal government's civil and criminal jurisdiction over Indian country within those States; Nebraska was a so-called P.L. 280 State. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. 1162; 28 U.S.C 1360). In 1968, Congress enacted a law permitting any of the P.L. 280 States to "retroce[de]" to the federal government "all or any measure of" jurisdiction previously transferred. 25 U.S.C. 1323. In 1969, the Nebraska Legislature "retrocede[d]" to the United States "all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska," with the exception of certain offenses involving motor vehicles. J.A. 1123; see J.A. 1122-1124. The Interior Department accepted that retrocession in October 1970. 35 Fed. Reg. 16,598 (Oct. 24, 1970). Of particular significance, the "Notice of Acceptance of Retrocession of Jurisdiction" describes the affected area as "Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County," which it defines by reference to "the west boundary line of the Omaha Indian Reservation *as originally surveyed.*" *Ibid.* (emphasis added); see J.A. 212-213.

Petitioners suggest (Br. 17, 32-33) that the State of Nebraska had a different view of the retroceded area, but that is incorrect. State officials have acknowledged that the disputed area was properly included in the State's retrocession of authority. In 1976, a Senate committee considered legislation to provide for retrocession without state consent. During hearings on the legislation, state officials repeatedly and without contradiction stated their understanding that the entirety of Thurston County—the western boundary

of which is coterminous with the Reservation's undiminished western boundary—is Indian country, and thus was included in the retrocession. See *Indian Law Enforcement Improvement Act of 1975: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 471 (1976) (*Hearings*) (Nebraska Assistant Att'y Gen.) ("All of Thurston County is within the exterior boundaries of the two reservations."); *id.* at 573 (Thurston Cnty. Att'y) ("The entire county is within the boundaries of the two reservations."). [13] The Nebraska Legislature has never sought to alter the geographic scope of the jurisdiction retroceded, even as it has considered legislation that would expand the retrocession to include motor vehicle offenses. See Leg. Res. 234, 100th Leg., 2d Sess. (Neb. 2008).

d. The Nebraska Department of Revenue has repeatedly issued revenue rulings stating that the disputed area lies within the Omaha Reservation. In 1976, the Department of Revenue was asked for advice "as to what constitutes a Nebraska Indian reservation for tax exemption purposes." Neb. Rev. Rul.

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[13] The Nebraska Assistant Attorney General testified that, prior to the transfer of jurisdiction under P.L. 280, the State may have "mistakenly" exercised criminal jurisdiction over the entire Omaha Reservation, "apparently concurrently with the Federal courts." *Hearings* 471. He explained that the State had done so believing it had gained jurisdiction "over Indians on the reservation" after Omaha lands were allotted and patented to Indians pursuant to the 1882 Act, *ibid.*—a theory that would have applied east as well as west of the right of way. He also acknowledged that this theory of state jurisdiction was rejected in *Omaha Tribe* v. *Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), aff'd, 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). *Hearings* 471.

99-76-6 (Oct. 13, 1976).[14] It responded that such a reservation comprises "[a]ll land within the original boundaries of any Nebraska Indian reservation which has not been specifically removed by an act of Congress or Executive Order." *Ibid.* The ruling goes on to describe the area encompassed within the Omaha Reservation, using its historical western boundary, and it specifies that Pender is "located within the boundar[y]" of the Reservation. *Ibid.* Subsequent rulings repeated that view. See Neb. Rev. Rul. 99-92-1 (Mar. 6, 1992)[15]; Neb. Rev. Rul. 99-90-1 (Apr. 3, 1990)[16]; Neb. Rev. Rul. 99-89-2 (Sept. 29, 1989).[17] In 2005, the Department of Revenue issued a one-sentence ruling stating that the 1992 ruling had been "rescinded." Neb. Rev. Rul. 99-05-01 (Sept. 29, 2005).[18]

e. In 2005, the State of Nebraska entered into an agreement with the Omaha Tribe for the collection of motor fuel taxes within the Reservation. J.A. 1145-1158; see Neb. Rev. Stat. Ann. § 66-741 (LexisNexis 2014) (authorizing tax-sharing agreements for sales "on a federally recognized Indian reservation"). The agreement exempts sales within the Reservation from state fuel taxes and instead imposes a tribal tax, which the State agrees to collect and divide with the Tribe. J.A. 1151 (Tribe keeps 75% of motor vehicle fuel tax and 60% of diesel fuel tax). The agreement applies only to sales "within the boundaries of [the Omaha]

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[14] Available on WestlawNext at RIA SLT NE 10/13/1976.

[15] Available on WestlawNext at RIA SLT NE NE05199203060008.

[16] Available on WestlawNext at RIA SLT NE NE05199004030008.

[17] Available on WestlawNext at RIA SLT NE NE05198909120002.

[18] http://www.revenue.nebraska.gov/legal/rulings/rr990501_rescind.pdf.

Reservation," J.A. 1150, although it does not specify those boundaries.

In 2006, Nebraska officials were sued by a group of motor fuel sellers and purchasers located in Pender who objected to the tribal tax. See Compl. at ¶¶ 1-14, 34, *Lamplot* v. *Heineman*, No. 4:06-cv-03075, (D. Neb. Mar. 28, 2006). The plaintiffs alleged that the State's tax-sharing agreement with the Tribe could not be enforced within Pender because, "[a]s a result of the 1882 Act, Pender is not part of" the Omaha Reservation. *Id.* at ¶ 72. The State moved to dismiss, arguing among other things that, should plaintiffs prevail, "there would be a diminishment of the tribal reservation." Doc. No. 14, at 2 (May 18, 2006); see Doc. No. 24, at 4 (July 20, 2006) ("Plaintiffs have alleged that Pender is not located on a 'federally recognized Indian reservation' as required by the Motor Fuel Statute. * * * Plaintiffs contend that Pender is not part of the reservation. Those assertions have no factual basis.") (citation omitted).[19]

f. Petitioners contend that "[f]rom 1882 until 2006, the State of Nebraska consistently exercised jurisdiction over Pender without any dispute or objection from the Omaha or the United States," and that "all governmental services are provided by state and local agencies." Br. 25, 33 (emphasis omitted). The joint appendix citations that follow fail to identify any exer-

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[19] The State ultimately declined to take a position in the litigation regarding whether "Pender, NE is within the Omaha Tribe's reservation boundaries." Doc. No. 31, at 2 (Oct. 23, 2006). The case was dismissed by the district court for lack of subject-matter jurisdiction and for failure to join an indispensable party, Doc. No. 36, at 7, 13 (Nov. 29, 2006), and the parties settled while the appeal was pending, Doc. No. 43, at 1 (Feb. 28, 2007).

cise of jurisdiction before 1999; and the State's right in the disputed area to provide services to non-Indians and Indians alike, and to exercise criminal jurisdiction and civil regulatory and adjudicatory jurisdiction over non-Indians, has never been contested.[20] Nor would those exercises of state authority conflict with the Tribe's authority, in the disputed area, to exercise jurisdiction over its own members and to exercise the limited jurisdiction over non-members on non-Indian fee lands that it has retained as a matter of inherent authority or that has been authorized by Congress. See pp. 8-9, *supra*.

In 1999, federal officials indicted a member of the Omaha Tribe on charges of using a dangerous weapon to intimidate and interfere with a law enforcement officer, but the indictment was dismissed and he was released into the custody of Thurston County, where he was charged with murder. See *United States* v. *Picotte*, No. 8:99-cr-00159-JFB (D. Neb.) (dismissed Oct. 6, 1999); J.A. 145-152. Nothing in the record reflects why the decision to transfer the defendant to state custody was made.

In 2007, the Nebraska Attorney General issued an opinion stating that the Omaha Reservation was diminished as a consequence of the 1882 Act, the 1912 Act, "and the subsequent treatment and character of the disputed territory." Letter from Jon Bruning, Neb. Att'y Gen., to Hobert Rupe, Exec. Dir., Neb. Liquor Control Comm'n (Feb. 15, 2007).[21]

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[20] By virtue of the 1969 retrocession, the federal government would have criminal jurisdiction over offenses committed by non-Indians against Indians. See 18 U.S.C. 1162.

[21] Available at https://ago.nebraska.gov/_resources/dyn/files/625522zfb113cfe/_fn/07005_2-15-07.pdf.

II. PRESENT-DAY EXPECTATIONS CANNOT JUSTIFY DIMINISHING THE OMAHA RESERVATION

Although the petition presents this Court with a question regarding the effect of the 1882 Act on the Omaha Reservation's boundaries, the real gravamen of petitioners' position (Br. 25) appears to be that "Nebraska residents living in the disputed areas have developed justifiable expectations over the past 130 years." See Br. 2 ("justifiable expectations"); see also Br. 22, 24, 25, 51, 52. Petitioners argue (Br. 52) that those present-day expectations would be "upset" if the Court were to permit the Tribe to enforce its liquor ordinance in the disputed area. Rather than an argument about the Reservation's boundaries, petitioners' real claim is that the "disruptive practical consequences" of recognizing tribal jurisdiction over the disputed area should "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214, 219 (2005).[22]

Although the United States disagrees with petitioners regarding the merits of that argument, the Court should not attempt to resolve it now. The only question raised and decided below, and the only question currently before this Court, is "whether Congress intended to 'diminish' the boundaries of the Omaha Indian Reservation in Nebraska when it enacted [the] 1882 Act." Pet. App. 12-13 (footnote omitted). That question is both analytically distinct

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[22] Petitioners' amici are even more explicit in calling for application of *City of Sherrill* rather than this Court's diminishment cases. See Village of Hobart et al. Amici Br. 6 (*City of Sherrill* "provid[es] an alternative to congressional diminishment"); Citizens Equal Rights Found. Amicus Br. 3.

from and logically prior to the question whether the Tribe may exercise jurisdiction over non-members within the Reservation's borders once those borders are properly understood. *City of Sherrill*, 544 U.S. at 215 n.9 (recognizing the distinction between a request for equitable relief against a tribe and a claim that the tribe's reservation has been disestablished by Congress). Moreover, application within the Reservation of the liquor law at issue here is expressly authorized by Act of Congress; it does not reflect a unilateral assertion of authority over non-Indians by the Tribe. See pp. 8-9, *supra*.[23]

This Court held more than a century ago that only Congress can diminish a reservation. See *United States* v. *Celestine*, 215 U.S. 278, 284 (1909); see also *City of Sherrill*, 544 U.S. at 215 n.9. Petitioners' plea that the Omaha Reservation has undergone "de facto" diminishment provides no basis for this Court to find diminishment de jure.

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[23] *City of Sherrill* also differs from the present case along a number of dimensions that would render it inapplicable here. Among other things, the land at issue in that case had been out of tribal control for more than 200 hundred years; the question was whether the tribe could repurchase the land piecemeal, "unif[y] fee and aboriginal title," and thereby "assert sovereign dominion over the parcels" in a tax dispute. 544 U.S. at 213; see *id.* at 202. The question here, by contrast, is solely whether Congress diminished the Omaha Reservation in 1882.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General
WILLIAM B. LAZARUS
MARY GABRIELLE SPRAGUE
KATHERINE J. BARTON
DARON CARREIRO
Attorneys

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APPENDIX

Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 provides:

CHAP. 434.—An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at law of such settler, who is a citizen of the United States, or who has declared his intention to become such,

shall be entitled to purchase, for cash, through the United States public land-office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act; *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payment, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made: *And provided further*, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases: *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre; *And provided further*, That all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, alter paying all expenses incident to and necessary for carrying

out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land-office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one sixteenth of a section; which allotments shall be deemed and held to be in lieu of the

allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patients shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the

United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and alloted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allottments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey, the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the

expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Approved, Aug. 7, 1882.